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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY RONALD TERPKO,

Defendant and Appellant.

H034168

(Santa Clara County
Super.Ct.No. CC817414)

A jury found the defendant, Jeffrey Ronald Terpko, guilty on charges stemming from a shoplifting episode. He claims that the trial court abused its discretion in admitting evidence that security officers paid particular attention to his fellow culprit because they knew her to be a shoplifter. We do not agree and will affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

The jury found defendant guilty of second degree robbery, a felony (Pen. Code, §§ 211, 212.5, subd. (c), 213, subd. (a)(2)), and battery, a misdemeanor (*id.*, §§ 242, 243, subd. (a)). Defendant admitted an enhancement allegation that he was out of custody on his own recognizance, following a felony charge of a drug-related crime, during the commission of the robbery. (*Id.*, § 12022.1.)

The verdicts were based on the following facts:

On September 4, 2008, defendant and his confederate, Joeline Piazza, were in the electronics department of a Target department store. Victor Ruiz, an employee charged

with preventing theft, recognized Piazza as someone who had stolen from the store before. He radioed another security officer, Michael Contreras, that there was a known thief on the premises and asked him to monitor Piazza on surveillance cameras. Ruiz followed Piazza and defendant. He saw each of them select a video game. They walked into another department, defendant gave Piazza the game he was holding, and Piazza put both games in her purse.

After Piazza and defendant concealed the video games in Piazza's purse they walked past the cash registers and left the store. Ruiz and Contreras told them to stop. Ruiz approached Piazza, who attempted to run, and Contreras approached defendant, who stopped.

Ruiz asked Piazza to give back the merchandise in her purse, but she refused, so Ruiz attempted to handcuff her. She struggled, pushed Ruiz, bit his hand, kicked him, and grabbed him in the groin area. She dropped her purse during the struggle.

Defendant picked up Piazza's purse and went to her aid. Contreras tried to grab the purse from defendant and defendant hit Contreras painfully in the groin and ran beyond the property perimeter and into the street, at which point Contreras, bound by a store policy against pursuit beyond company premises, let him go.

Ruiz testified that if he stopped innocent customers for suspected shoplifting three times he would be fired. In 47 incidents involving suspected shoplifters, he had detained an innocent customer once. Contreras testified if he committed two similar mistakes he would be fired.

Contreras managed to capture the incident on videotape, but evidently Ruiz accidentally deleted the portion showing the actual theft.

DISCUSSION

I. *Admitting Evidence of Piazza's Prior Suspected Thefts From the Store*

Defendant claims that the trial court erred under state law when it denied his motion to exclude evidence that Ruiz recognized Joeline Piazza as a prior shoplifter and,

seeing her on the premises, alerted Contreras and launched intensive surveillance of the defendant and Piazza.

In an in limine motion, defendant sought to exclude the foregoing evidence under Evidence Code section 352, i.e., that its probative value would be substantially outweighed by its unfairly prejudicial effect. In seeking to “exclude any evidence [that Piazza] was recognized from previous . . . Petty Theft incidents,” defendant reasoned that “[t]here is no evidence to suggest she was ever convicted of any prior thefts which may have occurred at that store, nor any evidence those thefts were ever reported to law enforcement agencies.”

In a hearing on the motion, the prosecution argued that the evidence was relevant to show why the security officers sounded the alarm on seeing Piazza, monitoring her movements and those of defendant painstakingly. The prosecution summarized that the evidence was relevant to explain the officers’ state of mind, i.e., a high level of alertness. Defense counsel initially conceded that the evidence might be relevant to explain the officers’ conduct, though the state of their minds that led to their conduct was of dubious relevance. Counsel maintained, however, that even if the evidence might be relevant, “to characterize my client as being with somebody [who’s] been in that store multiple times before” in order to steal “is more prejudicial than probative.” “[O]nce you started getting into a non-testifying witness’ prior bad conduct, and then place my client with that person, I think that their conduct bleeds off onto my client [and] prejudices him” Ultimately counsel argued that the evidence was both irrelevant and inadmissible under Evidence Code section 352.

The trial court disagreed and denied the motion. The court observed that the evidence was relevant not only to the security officers’ state of mind but also to explain their assiduous observation of defendant and his cohort. “[I]t seems to me there is a great deal of probative value as to why the officers were focusing on Miss Piazza, and . . . he was with her” As noted, thereafter the jury heard testimony that the security officers

went into a state of observational readiness on seeing Piazza on the premises. The court agreed, however, to instruct the jurors to consider the evidence only in evaluating the security officers' state of mind and their resulting actions. The court so instructed the jurors at the conclusion of the case.

Defendant claims that the evidence was substantially more prejudicial than probative (Evid. Code, § 352), was irrelevant (*id.*, §§ 210, 350), and constituted inadmissible character evidence (*id.*, § 1101).

Defendant did not preserve the character evidence claim for review. Defense counsel stated his objection precisely at trial: the evidence was substantially more prejudicial than probative and had no probative value, i.e., it was irrelevant. "I don't think it's probative, and it's more prejudicial than probative, and I would like to object on that basis." We can grant relief by reason of a claim on appeal that evidence was inadmissible only on the basis on which the claim was made before the trial court. (Evid. Code, § 353.) Even if we could disregard the statutory mandate, which we are not authorized to do, fairness to litigants and the trial court would require our conclusion that defendant forfeited the claim. It would be unfair if a party were permitted to "argue [that] the [trial] court erred in failing to conduct an analysis it was not asked to conduct." (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

As for defendant's preserved claims, the trial court did not abuse its discretion.

"On appeal, 'an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.) A trial court abuses its discretion when its ruling falls outside the bounds of reason. (*People v. Benavides* (2005) 35 Cal.4th 69, 88.)

The trial court could reasonably conclude, as it did, that the evidence was probative because it enhanced the security officers' credibility, and that it was not unduly prejudicial, especially given the court's eventual limiting instruction. It was to be expected that defendant would try to undermine the officers' credibility because one of

them erased a key portion of the surveillance video recording. Defense counsel mentioned during the same hearing, albeit after the court had denied the motion, that he intended to challenge the officers' "veracity" on this very basis. The erasure issue had been raised during the preliminary examination, and defendant's set of in limine motions included discovery requests of the store's loss prevention methodology and of anything pertaining to the security officers' "credibility, veracity or character." The court could reasonably conclude in these circumstances that evidence that the security officers had reason to be particularly focused on their job duties when they saw Piazza in the store was evidence the jury was entitled to hear in deciding whether the officers' work was diligent and attentive as opposed to so slipshod that it motivated the officers to erase a portion of the video surveillance recording that would be at odds with their accounts of the incident. There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

Duffy, J.

WE CONCUR:

Rushing, P. J.

Premo, J.